Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52
	)	

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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SUMMARY

The FCC must consider the full extent of competition in the broadband market as it considers the appropriate legal and policy framework to be applied to ILECs that provide broadband facilities and broadband-based services. Critics of the FCC's proposal to accord ILECs regulatory treatment that is equivalent to cable, its major competitor in the broadband access to the Internet market, present arguments that are backward looking. They seek to retain regulations on ILECs that are from a different era and were promulgated to address a regulatory environment that bears no relationship to today's competitive broadband mass market. The FCC must adopt rules that are relevant and appropriate to the present and create an environment that facilitates increased broadband investment in the future.

LEC provision of broadband transmission to an unaffiliated Internet service provider (ISP) is private carrier service. Those commenters that argue to the contrary offer no persuasive reason for why the FCC should find it to be private carriage when cable services providers provide standalone broadband transmission to unaffiliated ISPs1 but common carriage when it is provided by an ILEC. The National Cable Telecommunications Association's (NTCA) assertion that "notions of regulatory parity ignore fundamental differences among participants in the broadband marketplace, and take no account of the legacy regulations that have developed over the last half century to deal with the specific marketplace characteristics of such participants" is insufficient justification for such bald discrimination given cables market domination in the mass market broadband arena.

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[1] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling;* GN Docket No. 00-185; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. Mar. 15, 2002) (*Cable Declaratory Ruling*), at ¶ 54.

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REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTA),[2] through the undersigned and pursuant to Federal Communications Commission (FCC) Rules 1.415 and 1.419,[3] hereby submits its reply comments in the above-docketed proceeding. USTA filed comments in this proceeding on June 17, 2002, wherein it set forth it positions on the questions presented in the *Cable Modem Access Notice*.[4] In these reply comments, USTA will address comments filed by other interested parties concerning the provision of cable modem access transmission facilities to unaffiliated Internet Service Providers (ISPs); the universal service support obligations of broadband providers; and

[2] USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

[3] 47 C.F.R. §§ 1.415 and 1.419.

[4] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling*, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. Mar. 15, 2002) (*Cable Modem Access Notice*).

the applicability of the Communications Assistance for Law Enforcement Act (CALEA) to cable broadband equipment and facilities.

This rulemaking proceeding is linked to several other FCC rulemaking proceedings in which the FCC is examining the provision of broadband services and how it is to be regulated, if at all, by the FCC.[5] Through this rulemaking proceeding and its *Wireline Broadband Access* rulemaking proceeding, the FCC is examining the appropriate legal and regulatory policy framework under the Communications Act of 1934, as amended, for broadband access to the Internet over wireline broadband facilities and cable broadband facilities.[6] USTA's interest in this proceeding is to ensure that regulatory rules and policies applicable to broadband telecommunications and broadband telecommunications services are equally applied to providers of broadband telecommunications and broadband telecommunications services, regardless of the platform or technology employed.

The FCC states that the purpose of this proceeding is "whether there are legal or policy reasons why we should reach different conclusions with respect to wireline broadband internet access service and cable modem service. "[7] As Comcast cable points out, "the Commission's decision in the Declaratory Ruling further strengthens the case for maintaining the unregulated

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[5] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Companies Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket No. 02-33 and CC Docket Nos. 95-20, 98-10, FCC 02-42, Notice of Proposed Rulemaking (rel. Feb. 15, 2002) (*Wireline Broadband Access NPRM*); *Review of RegulatoryRequirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360, 16 FCC Rcd 22745 (rel. Dec. 20, 2001) (*Incumbent LEC Broadband NPRM*); and *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (rel. Dec. 20, 2001) (*Triennial Review NRRM*).

[6] *Id*. at ¶ 72.

[7] *Cable Modem Access Notice* at ¶ 78.

status of cable Internet services." USTA agrees with Verizon that "there are no reasons to treat similar, competitive services differently, and every reason to treat them the same."[8]

Finally, the FCC does not have the ability to change the scope of law enforcement's ability to compel compliance under CALEA as to those specific services and facilities covered by CALEA.

DISCUSSION

Many of the commenters in this proceeding cite prior FCC decisions and differing rules for cable, DBS, and other communications providers as support for the position that the FCC can continue its disparate regulatory treatment of ILECs that provide broadband services and facilities to the mass market and larger business market. These commenters refuse to accept the principle of regulatory parity and petition the FCC to ignore the principle as well. They also refuse to accept that as broadband changes in technology that the market place can no longer justify the distinction reflected in statutes and regulations promulgated during a different era. The Court in *United States Telecom Association, et al., v. Federal Communications Commission and United States of America*, Nos. 00-1012 *et al.* (D.C. Cir. May 24, 2002) (*USTA v. FCC*), made it very clear that the FCC cannot ignore the evidence of broadband competition, that the FCC itself has identified, in its regulatory treatment of ILECs. The Court agreed with the petitioners that the FCC completely failed to consider the relevance of competition in the broadband access to the Internet service market provided by cable (and to a lesser extent satellite) when it ordered the unbundling of the high frequency spectrum of ILEC copper loops.[9] As the court stated: "[t]he Commission thus appears to acknowledge that it adopted the Line Sharing Order with indifference to petitioners' contentions about the state of competition in the

[8] Accord SBC at 19.
[9] *USTA v. FCC*, slip opinion at 22.

market."[10] This deficiency in the FCC's Line Sharing Order resulted in the Court vacating and remanding the Order.[11] Commenters opposed to equitable regulatory treatment for ILECs attempt to have the FCC ignore the true state of broadband competition. The FCC cannot do so.

USTA agrees with the Statement of 43 Economists on the Proper Regulatory Treatment of Broadband Internet Access Services.[12] In addition, USTA believes that the Economists are absolutely correct in their assessment of the debilitating effects on consumers caused by the unwarranted regulation of ILECs providing broadband Internet access. The Economists are also correct in offering the following advice to the FCC:

> The Commission should strive to avoid asymmetrical treatment and consequent competitive handicapping of the several contestants in the broadband market. For it to impose heavier burdens on one set of facilities-based providers than on others can only discourage – as well as distort – the process of competitive innovation that is the central goal of our national telecommunications policy. The Commission should opt for deregulatory parity, in which all service providers have an opportunity to compete equally free from the heavy hand of government.[13]

Further, USTA agrees with President Bush that by placing ILEC broadband Internet access service on an equal, deregulated footing with cable broadband Internet access service, the FCC will spur the deployment of broadband infrastructure, unleash vigorous head-to-head competition for broadband Internet access services, increase consumer choice, and stimulate the nation's economy.[14] In the end, disparate treatment of ILECs is unjustified and places ILECs at a severe competitive disadvantage to their cable broadband competitors.

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[10] *Id.* at 23.
[11] *Id.* at 24.
[12] Filed in this proceeding and in CC Docket Nos. 01-339 and 01-337 on May 3, 2002 (Statement of 43 Economists).
[13] *Id.* at 5.
[14] In remarks at The 21st Century High Tech Forum on June 13, 2002, United States President George W. Bush commented on "the economic vitality that will occur when broadband is more fully accessible." The President also stressed the importance of increased broadband investment to the Nation and of policies that "eliminate hurdles and barriers to get[ting] broadband implemented."

Cable Modem Service is an Interstate Information Service

In its Declaratory Ruling, the FCC determined that cable modem service is an interstate Information service. The FCC, in its Wireline Broadband NPRM, tentatively concluded that wireline broadband Internet access service provided over a provider's own facilities is an information service. USTA concurs with Verizon, SBC Communications, Inc. (SBC), and BellSouth Corporation (BellSouth) that the FCC is correct in its conclusion in both instances because broadband service providers must operate under the same regulatory rules in order to avoid giving any one broadband platform or broadband service provider an advantage over another in the competitive marketplace. Thus, the FCC "should take coordinated action in all of its pending broadband-related proceedings – the Cable Broadband NPRM, the Wireline Broadband NPRM, the ILEC Broadband Non-Dominance NPRM and the Triennial Review proceeding – to establish a 'minimal regulatory environment' for all broadband Internet access services, regardless of technology or the historical classification of the service provider."[15]

USTA, however, still supports the notion that the only exception to this regulatory parity principle is that telecommunications carriers wishing to continue under Title II regulation for their broadband services, by participating in the NECA pools or filing individual company tariffs, should be able to do so. As was stated in USTA's initial comments, certain rural and high cost areas present unique circumstances that require taking a different approach to providing for the reasonable and timely deployment of broadband facilities. In such cases, the complete deregulation of broadband may discourage rather than encourage broadband investment and that outcome should be avoided.

[15] SBC comments at 3.

The FCC Should Not Mandate Open Access

USTA agrees with the majority of commenters in this proceeding that the FCC should not require that cable modem service providers provide open access. However, as SBC correctly points out, "some cable operators are attempting to exploit the situation by advocating the schizophrenic position that regulation is wholly unnecessary for cable broadband Internet services, but absolutely essential for competing wireline broadband Internet access service."[16] The FCC should realize that this argument for a disparate regulatory regime is completely lacking in credibility and is "not a legitimate justification for an asymmetric ISP access requirement."[17]

We agree with Cox Communications, Inc. (Cox) that "mandating access would be counterproductive if it would result in disruption of the very service that is being shared."[18] We further agree with Cox that "the Supreme Court recently recognized in *Verizon v. FCC*, and as the Commission determined when it adopted its ILEC unbundling rules, access requirements, even when mandated by statute, must give way to the facilities owner's need to maintain network reliability and security."[19]

Motorola in its comments states that the FCC has addressed the question of whether "forced access" regulation is necessary to provide consumers with a choice of ISPs and they have consistently concluded that no such regulation is needed because of the FCC's longstanding policy of "vigilant restraint."[20] "Rather than spurring investment in additional broadband facilities, therefore, an access requirement would impede investment and innovation-contrary to

[16] *Id.* at 16.
[17] *Id.*
[18] Cox comments at p. 32-33.
[19] *Id.*
[20] Motorola comments at 1.

the FCC's express policy objectives . . .."[21] USTA agrees with Motorola and continues to believe that market forces should govern ISP access, not government regulations. Thus, absent a clear demonstration that ISPs are unable to reach commercial arrangements with broadband transmission providers the FCC should not require any broadband provider to provide open access.

The FCC Should Assert Title I Jurisdiction

USTA concurs with Verizon that to the extent that the FCC asserts its Title I regulatory jurisdiction to wireline broadband Internet access service providers, it should likewise assert its Title I regulatory jurisdiction with respect to cable modem service providers. In the end, the best approach to regulating the broadband market would be to treat all broadband services similarly under Title I of the Communications Act.[22] To do otherwise, would be arbitrary, discriminatory and contrary to the public interest.

Several commenters in this proceeding have stated that universal service should either apply or not apply to all broadband service providers. USTA continues to advocate the position that contribution to the Universal Service fund should apply equally to all providers of broadband services regardless of the technology or platform used to provide such service. USTA agrees with Verizon's assertion that "whatever universal service obligations are imposed on one class of provider must be the same as the obligations imposed on other classes."[23] The FCC can

[21] *Id.*
[22] Verizon comments at 6. *See also Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994)(stating that "If the carrier chooses its clients on an individual basis and determines in each particular case "whether and on what terms to serve" and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier. Employing this test, the Commission has afforded Title I treatment to offerings that either are pure transmission or have a transmission component"). For example, the Commission has given providers of satellite services the option of offering service on a private carrier basis under Title I.
[23] Verizon comments at 30.

ensure that cable modem service providers support universal service in a fair and equitable way by first finding, pursuant to Section 254(d), that the public interest requires such support based on their provision of interstate telecommunications as an integrated element of their interstate information service. Having made such a finding, the FCC can then assert its Title I ancillary jurisdiction to compel cable modem service providers to make an appropriate contribution to the support of universal service.

Section 706 Provides the FCC with Statutory Authority to Act

Section 706 of the Communications Act of 1996 imposes upon the FCC the obligation to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[24] In the *Cable Modem Access Notice*, the FCC looked towards section 706 and section 230(b)(2) for guidance, which mandates the preservation of the "vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal and State regulation."[25] As SBC correctly points out in its comments, the FCC has an express congressional directive to establish a consistent regulatory framework for all broadband services. Moreover, we agree with Comcast that the FCC realizes that the best way to facilitate the goals of section 706 is to create a regulatory environment that is minimalist in its requirements.

[24] 47 U.S.C. § 706(a).
[25] *Cable Modem Access Notice* at ¶4.

The Constitution Requires Equal Treatment For Similarly Situated Broadband Services

We disagree with Cablevision Systems Corporation's (Cablevision) assertion that "apart from the lack of any statutory basis for imposing forced access obligations, such rules also would contravene cable operator constitutional rights."[26] Further, we disagree with Cox's assertion that integrated Internet service by cable operators is entitled to First Amendment protection. While USTA still believes that open access should be encouraged but not mandated, we do not believe that an open access requirement applied to cable modem Internet access service is prohibited by the First Amendment to the U.S. Constitution.

Common carriers have historically operated with nondiscrimination obligations. Such nondiscrimination obligations in the common carrier context are analogous to an open access obligation for cable modem service providers. While it would be bad policy for the FCC to impose open access obligations on cable modem service providers, it would not be unconstitutional.

Moreover, we agree with Verizon and do not believe that open access gives rise to a Fifth Amendment takings claim. This is contrary to Cox's assertion that "the imposition of access requirements on cable modem service not only lacks any legal or policy basis, but also would be unconstitutional."[27] We still believe that an open access requirement does not deprive a cable modem service provider of the use of its property.

USTA still believes, however, that the more compelling question is whether the constitutional rights of wireline broadband Internet access service providers are abridged when regulatory burdens are placed upon them that are not applied to their similarly situated competitors and those regulatory burdens place them at a material disadvantage in the

[26] Cablevision comments at 10.
[27] Cox comments at 37.

competitive marketplace. We concur with Verizon that "to the extent that the Commission concludes that the Takings Clause is an impediment to the imposition of an open access requirement for multiple ISPs on cable networks, it would likewise be an impediment to the imposition of such a requirement on local telephone company networks."[28] The FCC can alleviate this concern by removing existing regulatory burdens that are imposed on wireline broadband Internet access service providers and place such broadband providers on an equal regulatory footing with nonwireline broadband providers.

Equivalent Title II Forbearance is Required

Contrary to the assertions of other commenters in this proceeding, regulatory parity would require that the FCC not continue to impose Title II regulation upon wireline broadband Internet access service providers. We support Verizon's assertion that the "dramatic difference in regulatory treatment of substantially identical services did not represent a considered judgment on the part of the Commission," but rather "regulatory creep."[29] Since telecom companies were regulated for voice services under Title II, the FCC automatically subjected them to Title II regulation in the provision of broadband as well. There is no justifiable reason to continue extending Title II to wireline broadband Internet access service providers. There is a fundamental need for regulatory parity among all providers of broadband service.

Broadband Internet Access Service is Interstate and Should Not be Subject to State Regulation

The majority of commenters agree with the FCC's finding that Internet access service is interstate in nature, and this conclusion is unaffected by the particular broadband platform over which the Internet access service is provided. In addition, we agree with Cox that "Congress's

[28] Verizon comments at 23.
[29] Verizon comments at 16.

decision not to reserve any regulatory authority to State and local governments over Title I interstate information services reflects its concern that such regulation would conflict with the deregulatory national policy that Congress has adopted for this category of services."[30] Moreover, the majority of commenters seem to be in agreement that to assert jurisdiction over broadband will invite increased regulation and costs for broadband providers that would ultimately discourage broadband investment. USTA continues to believe that the FCC has sufficient grounds upon which to retain exclusive jurisdiction over Internet-bound traffic, and it should do so. USTA agrees with Cablevision that the provision of broadband services does not impose any additional burden on local rights-of-way or costs on municipalities. Finally, to the extent that state and local governments have a legitimate public health, safety and welfare interest in managing state and local rights-of-way, the FCC must restrict the ability of states and local governments from imposing unreasonable and unnecessary restrictions and costs upon broadband service providers that seek to deploy broadband facilities.

FCC Action Should Not Change CALEA Requirements

CALEA requires telecommunications carriers, under certain circumstances, to ensure that law enforcement has the technical capability to conduct electronic surveillance that is otherwise lawful. Facilities that must be CALEA compliant are defined in the CALEA statute, and the FCC cannot change those definitions. Accordingly, the FCC does not have the ability to change the scope of law enforcement's ability to compel compliance under CALEA as to those specific services and facilities covered by CALEA. Likewise, the FCC is not empowered to expand the scope of CALEA. USTA would be particularly concerned if in the course of this proceeding the

[30] Cox comments at 38.

FCC attempted to expand the scope of the CALEA and in the process impose an unfunded mandate upon broadband providers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on August 6, 2002, Reply Comments Of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the attached service list.

/s/Meena Joshi
Meena Joshi